JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 340

STATE OF NORTH CAROLINA,

Respondent,

v.

ELMER DAVIS, JR.

(Petition of Nivens and Bell, Attorneys)

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH CAROLINA

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH CAROLINA

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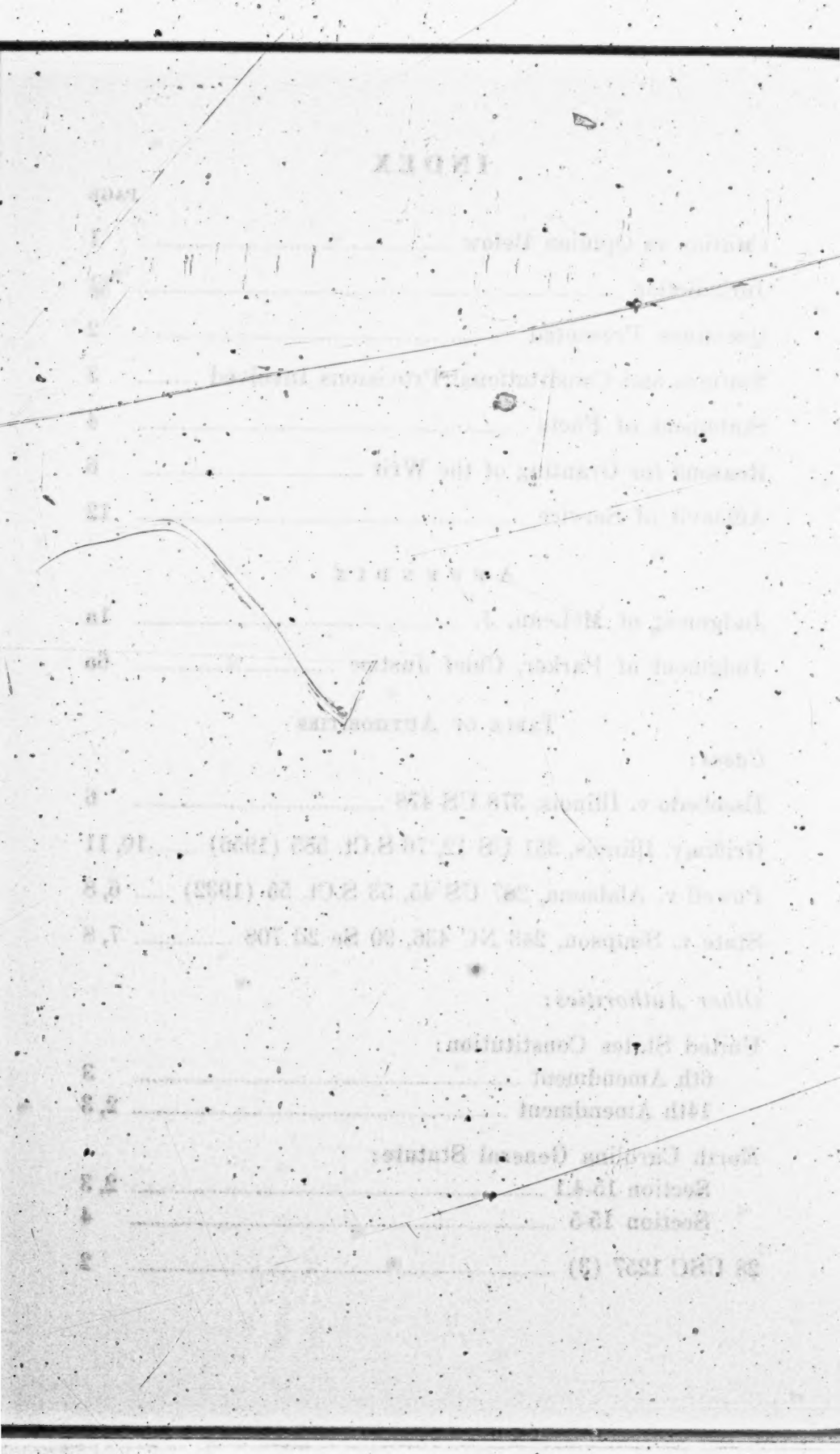

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(Petition of Nivens and Bell, Attorneys)

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH CAROLINA

Petitioners pray that a Writ of Certiorari issue to review the Judgment of the North Carolina Supreme Court which was rendered in the above entitled case on April 12, 1967.

Citation to Opinion Below

The opinion of the North Carolina Supreme Court is reported at 270 NC page 1.

Jurisdiction

On the 14th day of October, 1966, Judge W. K. McLean, presiding and holding one of the Courts of the Superior Court of Mecklenburg County entered a judgment based upon a petition filed by these petitioners, allowing them Eight Thousand ($8,000.00) Dollars for their legal services performed in representing Elmer Davis, Jr., an indigent

defendant, in the Federal Court for a case which originated in the State Courts. Judge McLean thereafter granted a stay of execution and allowed the state of North Carolina to file a petition in the Supreme Court of North Carolina for a review of his judgment and upon the hearing of this matter before the North Carolina Supreme Court the decision of Judge W. K. McLean was declared null and void and therefore reversed. The jurisdiction of this Court is invoked under 28 USC 1257 (3), petitioners having asserted in their original petition in the Superior Court of Mecklenburg County, North Carolina rights, privileges and immunities conferred by the Constitution of the United States.

Questions Presented

1. Does the failure of a State to compensate Attorneys for services performed an indigent defendant in a capital case in the Federal Court amount to an effective denial of the indigent defendant's right to counsel as required by the 6th Amendment to the United States Constitution and "made obligatory upon the States by the 14th Amendment" when said case originated in the State Court?

2. Does the refusal of a State to pay attorney fees for legal services performed in the Federal Courts on behalf of an indigent defendant in a capital case which originated in a State Court amount to the taking of said attorneys property without due process of law and a denial of his rights under the equal protection of the laws provision of the 14th Amendment to the United States Constitution?

3. Should a State Statute (N. C. G S Section 15-4.1) which is constitutional on its face be interpreted in such a way that it becomes unconstitutional in its application?

Statutes and Constitutional Provisions Involved

1. 14th Amendment to the United States Constitution, Section 1:

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

2. 6th Amendment to the United States Constitution:

"In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense."

3. North Carolina General Statute, Section 15-4.1:

"When any person is bound over to the Superior Court to await trial for an offense for which the punishment may be death, the clerk of the Superior Court in the county shall, if he believes that the accused may be unable to employ counsel, within five days notify the resident judge of the district or any Superior Court Judge holding the Courts of the District and request

the immediate appointments of counsel to represent the accused. If the judge is satisfied that the accused is unable to employ counsel, he shall appoint counsel to represent the accused as soon as may be practicable. He may appoint counsel at any time regardless of whether notified by the Clerk and before preliminary examination.

In any capital case where the appointment of counsel is delayed until the term of Court at which the accused is arraigned, on motion of counsel for the accused the case shall be continued until the next ensuing term of criminal court."

4. North Carolina General Statute, Section 15-5:

"Whenever an Attorney is appointed by the Judge to defend a person charged with a capital crime, he shall receive such fee for performing this service as the Judge may allow; but the judge shall not allow any fee until he is satisfied that the defendant charged with the capital crime is not able to employ counsel. The fees so allowed by the judge shall be paid by the County in which the indictment was found."

Statement of Facts

On November 2, 1959, the petitioners herein were appointed by the Honorable Francis O. Clarkson to represent one, Elmer Davis, who was charged in a bill of indictment with the "rape—murder" of one, Mrs. Foy Bell Cooper, which charge was a capital offense and the pertinent paragraph of said appointment reads as follows:

"Now, therefore the Court appoints Charles V. Bell and Walter Nivens of the 26th Judicial Bar to represent the above . . . named defendant, Elmer Davis, in

the 'Superior Court' of Mecklenburg County, North Carolina."

At the trial of said case the petitioners raised certain constitutional questions by motion, which motions were denied and the defendant was found "guilty" and sentenced to die in the gas chamber in the State Penitentiary, Raleigh, North Carolina. The petitioners herein in apt time gave notice of appeal to the North Carolina Supreme Court where the judgment of the Superior Court of Mecklenburg County was affirmed.

Thereafter, the petitioners filed a petition for certiorari in the United States Supreme Court and said petition was denied. Stays of execution were received both from the North Carolina Supreme Court and the Federal District Court and the petitioners herein filed a petition for a Writ of Habeas Corpus in the Federal District Courts, Raleigh, North Carolina, which petition was denied. From a denial of the petition aforesaid the petitioners appealed to the United States Court of Appeals for the Fourth Circuit, where the Federal District Judgment was reversed and the case remanded for a full hearing of the evidence. After the full hearing the petition for habeas corpus was again denied from which judgment the petitioners herein again appealed to the United States Court of Appeals for the Fourth Circuit where the decision of the District Court was eventually affirmed with two Judges dissenting.

The petitioners thereafter filed another petition for certiorari before the United States Supreme Court, an order was entered allowing said petition and, after the filing of briefs and the hearing of oral arguments, the judgment of the United States Court of Appeals aforesaid was reversed.

The respondents herein were paid the sum of One Thousand Seven Hundred ($1,700.00) Dollars for representing the defendant, Elmer Davis, in the State Courts, and that on July 19, 1966, the petitioners filed a petition before Judge W. K. McLean for an allowance of expenses and attorneys' fees for representing Elmer Davis, Jr., an "indigent defendant," in the Federal Courts.

At the hearing on said petition and after answers filed by both the State of North Carolina and Mecklenburg County, the Honorable W. K. McLean ordered that the respondents be paid the sum of $4,000.00 each for their services rendered the defendant in the Federal Court, which sum was to be paid from the "indigent defendant fund" established and created by the Legislature subsequent to the trial of this defendant in the State Court, and from this judgment the State of North Carolina filed a petition for certiorari to the North Carolina Supreme Court, which petition was granted. The Supreme Court of North Carolina reversed the decision of Judge W. K. McLean.

Reasons for Granting of the Writ

The right of an indigent defendant in capital cases was recognized as early as 1932 in the case of *Powell* v. *Alabama*, 287 US 45, 53 S. Ct. 55 (1932). This right has been refined and broadened up until the present time where it was dramatically illustrated by the U. S. Supreme Court in *Escobedo* v. *Illinois*, 378 US 478.

There is no clear cut authority to the effect that the allowance of attorneys' fees is an indispensable adjunct to the preservation of constitutional rights and this is probably true because the expenses in a significant number of cases have been borne by charitable or civic organi-

zations. However, to pursue this course and to continue to depend on such organizations will lend itself to apathy on the part of State Legislatures, and the courts and the attainment of Justice will altogether depend upon fortuitous events.

In the case of *State* v. *Simpson*, 243 NC 436, 90 Se 2d 708, this Court recognized the right to counsel in a capital case where the defendant is indigent.

It was stipulated in this case as follows: "(1) The appellant is a poorly educated colored woman, unfamiliar with court and jury trial procedure; (2) She is a pauper, financially unable to employ counsel; (3) The State was represented at the trial by the solicitor . . . ($)The co-defendant McNair was represented by two attorneys of his own selection."

To the foregoing the Court gave this response: "Under the facts stipulated, the appointment of counsel was mandatory."

The State in this case seems to rely heavily on three points:

1. The petitioners are volunteers; (2) they failed to receive an order from any court appointing them; (3) the State statute allowing for the appointment and pay for attorney's fees extends only to legal duties performed in the State Courts.

In response to the first and second points raised herein, the petitioners point out to the Court that it has been the general practice in this State that once an attorney is appointed to represent an "indigent" defendant, he is not relieved of his appointment until he has exhausted all reasonable remedies for the protection of said defendant. Moreover, once the State assumes the responsibility of

affording counsel for an indigent defendant, it stands in the place of, and assumes the responsibilities of the indigent with respect to the case wherein counsel is appointed. Surely Elmer Davis, the defendant in this case, can not be heard to say that the petitioners were volunteers, or that they had received no order from him to represent him in the Federal Court. This being true, the State cannot defend its position by arguing that the petitioners are volunteers.

It has also been found as a fact by the trial Judge and stipulated to by all of the parties hereto that the defendant was "indigent" throughout his trial in both the State and Federal Courts, and whether the petitioners herein were volunteers or not is now moot, the question now before the Court is whether or not the presiding Judge had the authority to allow these petitioners a fee as set out in his Judgment entered herein on October 14, 1966.

There is an abundance of authority to the effect that "indigent" defendants in Capital cases are entitled to be represented by counsel provided by the State, in the absence of statute. See *Powell* v. *Alabama* (supra). Our Court recognized this fact in the following language: "It was immaterial whether she (the defendant) requested the appointment. Failure to make the request indicates either she did not realize her predicament or did not know she had a right to have the court appoint an attorney for her . . ."

"The appellant here went to trial and judgment without counsel. She was tried and convicted without due process of law." *State* v. *Simpson* (supra).

The State cannot defend its position by maintaining that the North Carolina Statute commanding the appointment of counsel and payment of fees in cases of "indigent" de-

fendants is only applicable to service performed in the State Courts.

This conclusion would create an anomaly both in law and in fact. First of all, the argument advanced by the State fails to take under consideration the urgency of the situation of the defendant in this case.

The defendant here was found guilty in the Superior Court of Mecklenburg County and sentenced to "die." The judgment of the Superior Court was affirmed by the North Carolina Supreme Court. According to the State, the services of these petitioners terminated. It is admitted by all of the parties hereto that the defendant was "indigent." The record indicates that he was "illiterate." The death of the defendant was imminent, and execution of the judgment rendered in the Superior Court would have made all constitutional questions moot. By what means could the Federal Court discover this unfortunate victim (whose constitutional rights had been violated) in the North Carolina prison system? The answer to this question points up the patent defects in the argument of the State.

This was a crime for which this defendant was charged in the State Courts and the fact that he had to seek Federal remedies does not excuse the State of its legal obligations to indigent defendant in "Capital" cases.

Moreover, the State participated through the Attorney General's Office and the local Solicitor's Office in every step of the trial in the Federal Courts.

After a final determination of the matter the cost of court was assessed against the State of North Carolina, and the same was paid out of State funds. This was the State of North Carolina vs. Elmer Davis and inversely Elmer Davis vs. North Carolina—Never the United States vs. Elmer Davis. By what reason now can the State of

North Carolina deny its obligation to an indigent defendant in a Capital case?

It is a denial of due process and of the equal protection clauses of the Fourteenth Amendment when a State refuses to provide counsel for an accused person who desires appellate review of his conviction, but who is unable because of his poverty to obtain legal assistance.

In *Griffin* v. *Illinois*, 351 US 12, 76 S. Ct. 585 (1956), the United States Supreme Court held that the due process and equal protection clauses of the Fourteenth Amendment were violated by the State's denial of appellate review solely on account of a defendant's inability to pay for a transcript. Both State and Federal Courts have made it clear beyond question that access to the courts may not be denied to the poor, while available to the wealthy. It is further well established fundamentally that poor defendants should not be deprived of an appeal because of poverty. The Court went on to say, in *Griffin* v. *Illinois* (supra): "Surely no one would contend that either a State or the Federal Government could constitutionally provide that defendants, unable to pay court costs in advance, should be denied the right to plead not guilty or to defend themselves in court. Such a law would make the constitutional promise of a fair trial a worthless thing. The right to be heard, and the right to counsel would under such circumstances be meaningless promises to the poor."

We submit that, while the Court in *Griffin* does not hold that a State is obligated to provide counsel for an indigent seeking appellate review, the language of the court, however, indicates that the only logical conclusion which can be reached is that an indigent convicted of a crime is, as a matter of Federal constitutional law, entitled to State aid, including the providing of legal counsel at State expense. A careful reading of the Supreme Court's ruling

in the *Griffin* Case points out that the essence of the ruling is that a person convicted of crime cannot be put at a substantial disadvantage with respect to appellate review simply because he is unable to financially afford the expense involved.

It certainly cannot be claimed that an attempt at appellate review without the assistance of legal counsel is not a substantial disadvantage to an indigent seeking such review. Thus it is clear that the State was obligated to provide legal counsel for the indigent defendant, Elmer Davis, Jr., and therefore is obligated to pay the expenses incurred in his appellate review, including the payment of counsel fees for the legal assistance given the indigent defendant.

Finally we urge upon the Court that this petition should be granted because the questions presented here are of public importance in that this Court has attempted to protect the indigent as well as the rich, and these questions have never been decided before by this Court.

This the 3rd day of July, 1967.

Respectfully submitted,

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Attorneys for Petitioners

Affidavit of Service

WALTER B. NIVENS being first duly sworn, deposes and says:

That he is one of the attorneys of record in the above captioned case with his office at 235 South Brevard Street, Charlotte, North Carolina; that on the 7th day of July, 1967, he served a copy of the attached petition for Writ of Certiorari on the Attorney General of the State of North Carolina, by placing a copy of said petition in an envelope properly addressed to their office in the Justice Building Raleigh, North Carolina, for delivery by the United States Post Office Department as directed by said envelope.

/s/ WALTER B. NIVENS
Walter B. Nivens, Attorney

Subscribed and sworn to before me
this 7th day of July, 1967

/s/ PETER MEILEN

PETER MEILEN
Notary Public, State of New York
No. 31-7886275
Qualified in New York County
Commission Expires March 30, 1968

APPENDIX

Judgment of McLean, J.

(Filed October 14, 1966)

IN THE

SUPERIOR COURT OF MECKLENBURG COUNTY

STATE OF NORTH CAROLINA,

v.

ELMER DAVIS, JR.

This cause coming on to be heard and being heard before the undersigned Judge presiding at the B term of the Superior Court of Mecklenburg County, upon a verified petition of Walter B. Nivens and Charles V. Bell for an allowance of attorney fees for their representation of the defendant in this cause;

And it appearing to the Court and the Court finding as a fact as follows:

1. That after the petitioners herein had exhausted their remedies in the State Courts of North Carolina, they filed a Petition for Certiorari in the United States Supreme Court which petition was denied.

2. That after having filed said petition in the Supreme Court of the United States the petitioners herein filed a Petition for a Writ of Habeas Corpus in the Federal District Court for the Eastern District of the State of North Carolina on behalf of this

defendant, which petition was denied and from said judgment the petitioners appealed to the United States Court of Appeals for the Fourth Circuit.

3. That a hearing was held on said appeal before the Fourth Circuit Court of Appeals in Baltimore, Maryland, and subsequent thereto said Court ordered a re-argument which was heard before the Court sitting en banc in Asheville, North Carolina.

4. That after said hearing the judgment of the Federal District Court was reversed and the cause remanded to the Federal Eastern District Court for plenary hearing.

5. That, pursuant to said order, a hearing was held in the Federal District Court for the Eastern District of North Carolina at Raleigh, North Carolina, Judge Algernon Butler presiding, and the Petition for a Writ of Habeas Corpus was again denied by said Court and from this judgment another appeal was perfected to the Fourth Circuit Court of Appeals in behalf of the defendant.

6. This matter was again heard and oral argument had in the Fourth Circuit Court of Appeals sitting in Richmond, Virginia, and afterwards said Court requested of attorneys representing the defendant and the State of North Carolina their consent that the matter be heard before the Court en banc on taped oral arguments, and after which time said Court affirmed the judgment of the Federal District Court aforesaid.

7. That after said judgment was rendered by the Fourth Circuit Court of Appeals, Elmer Davis, Jr.,

through his counsel, again filed a Petition for Certiorari to the United States Supreme Court, which petition was allowed.

8. That subsequent thereto this case was argued before the United States Supreme Court and the judgment of the Fourth Circuit Court of Appeals was reversed and the case remanded to the Federal District Court for the Eastern District of North Carolina for further orders consistent with the judgment of the Supreme Court of the United States.

9. That the State of North Carolina elected not to retry Elmer Davis, Jr. for the rape-murder of the late Foy Bell Cooper and he was thereafter ordered released from the State Prison at Raleigh, North Carolina, by the Honorable Algernon Butler, Judge Presiding.

10. That during all these proceedings hereinbefore set forth, the State of North Carolina was represented by the State Attorney General's office and by Kenneth R. Downs, Solicitor of the 14-A Solicitorial District, in the Federal District Court for the Eastern District of North Carolina.

11. That it is stipulated and agreed by all the parties hereto that the expense incurred by the petitioners herein amounted to One Thousand Seven Hundred Fifty-eight and 72/100 ($1,758.72) Dollars. It was stipulated and agreed by the attorneys for the State of North Carolina and Mecklenburg County that throughout the course of these proceedings Elmer Davis, Jr., the defendant herein, was an indigent and was represented by the attorneys as such.

12. That when these petitioners were apppointed to represent this indigent defendant aforesaid, Mecklenburg County was liable to pay said petitioners reasonable attorney fees and that said County did pay these petitioners the sum of Seventeen Hundred ($1700.00) Dollars for their services, and that since June 21, 1963, the responsibility for paying attorney fees for indigent defendant was placed upon the State of North Carolina pursuant to the provisions of Chapter 1080 of the North Carolina General Session Laws of 1963.

13. That even though the petitioners herein expended their services in both the State and Federal Courts, this case originated in the North Carolina State Court and more specifically Mecklenburg County Superior Court, and hence the State of North Carolina is liable for payment of attorney fees due these petitioners and that the payment of these fees is to be assessed and paid from the indigent defendant fund pursuant to Chapter 1080 of the North Carolina General Session Laws of 1963. It has been the policy in North Carolina for a number of years that attorney fees are paid to attorneys representing indigent defendant charged with a capital offense.

14. That the petitioners herein spent in excess of four hundred (400) hours in preparation of pleadings and presentation of this case before the Federal Courts and that the value of said services at the rate of twenty ($20.00) dollars per hour including their expenses hereinbefore set forth is just and reasonable.

15. That a refusal to pay these petitioners is a denial of their rights under the Equal Protection and

Due Process Clauses of the Fourteenth Amendment to the Constitution of the United States and a deprivation of their rights under the Constitution of North Carolina.

16. That the State of North Carolina paid all cost assessed by the Government which covered the cost in the District Court, the United States Court of Appeals for the Fourth Circuit, and the United States Supreme Court and said cost assessed amounted in excess of Three Thousand Seven Hundred ($3,700.00) Dollars.

NOW, THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED that the State of North Carolina pay to these petitioners out of the Indigent Defense Fund established pursuant to Chapter 1080 of the General Session Laws of 1963 aforesaid, the sum of Eight Thousand ($8,000.00) Dollars, which amount is to be equally divided between the petitioners herein, and said amount is allowed in addition to the amount heretofore paid by Mecklenburg County to these petitioners.

This the 14th day of October, 1966.

/s/ W. K. McLEAN
Judge Presiding.

RECORDED IN MINUTE BOOK
Book No. 110, Pages 451 and 452.

Judgment of Parker, Chief Justice

SUPREME COURT OF NORTH CAROLINA

SPRING TERM 1967

No. 265—Mecklenburg

STATE OF NORTH CAROLINA,

v.

ELMER DAVIS, JR.

(Petition of Nivens and Bell, Attorneys)

On certiorari, allowed 4 November 1966, on petition of the Attorney General of North Carolina to review a judgment entered by McLean, Jr., 14 October 1966, B Session of Mecklenburg, ordering the State of North Carolina to pay to Walter B. Nivens and Charles V. Bell, pursuant to Ch. 1080 of the Session Laws of 1963, the sum of $8,000, to be equally divided between them, for legal services rendered by them in the courts of the United States in behalf of Elmer Davis, Jr., an indigent defendant, whose sentence of death by asphyxiation, based upon a jury verdict of guilty of murder in the first degree, had been upheld by the Supreme Court of North Carolina in the case of *S. v. Davis*, 253, N.C. 86, 116 S. E. 2d 365, in an opinion filed 12 October 1960, which fee of $8,000 was allowed them in addition to the sum of $1,700 formerly paid to them by Mecklenburg County by order of court for their legal services in defending the said Elmer Davis, Jr., in the courts of the State of North Carolina. Docketed and argued as Case No. 272-L, Fall Term 1966.

The history of this case is as follows: At the 2 November 1959 Term of the Superior Court of Mecklenburg County the grand jury returned a true bill of indictment charging that Elmer Davis, Jr., on 20 September 1959 with force and arms at and in Mecklenburg County did unlawfully, willfully, and feloniously while perpetrating a felony, to wit, rape, kill, and murder Foy Bell Cooper. On 10 November 1959 Francis O. Clarkson, Judge presiding over the court in Mecklenburg County, entered an order finding that the said Elmer Davis, Jr., is an indigent person charged in an indictment with the capital felony of murder in the first degree, and appointed Walter B. Nivens and Charles V. Bell to represent him "in the Superior Court of Mecklenburg County, North Carolina." Upon this indictment the said Elmer Davis, Jr., was tried by Campbell, J., and a jury at the 7 December 1959 Regular Criminal Term of Mecklenburg County Superior Court. Upon his arraignment defendant through his court-appointed counsel, Nivens and Bell, entered a plea of not guilty. The jury returned for its verdict, "Guilty of murder in the first degree." From a judgment of death in the manner prescribed by law, defendant appealed. Upon his appeal the Supreme Court of North Carolina found no error in the trial below. *S.* v. *Davis, supra.* Thereafter, the said Nivens and Bell, court-appointed counsel for Elmer Davis, Jr., petitioned the Supreme Court of North Carolina for a rehearing, which motion was denied.

Upon the denial of their petition for rehearing by the Supreme Court of North Carolina, the said Nivens and Bell procured from the North Carolina Supreme Court a stay of execution of the death sentence of Elmer Davis, Jr., and filed a petition for *certiorari* before the United States Supreme Court. The United States Supreme Court denied

the *certiorari*. Mr. Justice Douglas was of the opinion that the *certiorari* should be granted. *Davis* v. *State of North Carolina*, 365 U. S. 355, 5 L. Ed. 2d 819 (20 March 1961).

Thereafter, the said Nivens and Bell filed a petition in behalf of the said Elmer Davis, Jr., who was in the custody of the State of North Carolina under sentence of death, for a writ of habeas corpus in the United States District Court for the Eastern District of North Carolina, Raleigh Division. Butler, Chief Judge for the United States District Court for the Eastern District, filed an elaborate written opinion on 25 July 1961 denying the writ. *Davis* v. *State of North Carolina*, 196 F. Supp. 488. Petitioners, in behalf of the said Elmer Davis, Jr., appealed to the United States Court of Appeals, which court in a majority opinion, with Haynsworth, J., dissenting, reversed Judge Butler's decision and remanded the case to the Federal District Court for a rehearing on the question of whether defendant's confession was obtained within the bounds of due process. *Davis* v. *State of North Carolina*, 310 F. 2d 904, decided 7 November 1962. Upon the rehearing, pursuant to the mandate of the Fourth Circuit Court of Appeals, Judge Butler wrote an elaborate opinion again denying the petition for a writ of habeas corpus. *Davis* v. *State of North Carolina*, 221 F. Supp. 494. The opinion was filed 10 September 1963.

The said Nivens and Bell, in behalf of the said Elmer Davis, Jr., appealed again to the United States Court of Appeals, Fourth Circuit, which court in a majority opinion joined in by three judges, with two dissenting, affirmed Judge Butler's decision in an opinion filed 8 December 1964. *Davis* v. *State of North Carolina*, 339 F. 2d 770. The said Nivens and Bell, according to a petition for the allowance of counsel fees for their appearances for the said Elmer Davis, Jr., in the United States courts, allege that they

again filed a petition for a *certiorari* with the United States Supreme Court. The Supreme Court of the United States of the United States granted the petition for *certiorari* in the following language:

> "No. 37, Misc, Davis v. North Carolina. C. A. 4th Cir. Motion for leave to proceed *in forma pauperis* and petition for writ of certiorari granted. The case is transferred to the appellate docket. Conrad O. Pearson for petitioner. T. W. Bruton, Attorney General of North Carolina, and James F. Bullock, Assistant Attorney General, for respondent. Reported below: 339 F. 2d 770." 382 U. S. 953, 15 L. Ed. 2d 358.

On June 30, 1966 the Supreme Court of the United States, in an opinion written by Chief Justice Warren expressing the views of six members of the Court, held that the confession of Elmer Davis, Jr., was involuntary and inadmissible in evidence. Mr. Justice Clark, in an opinion joined in by Mr. Justice Harlan, dissented on the ground that the findings supported the conclusion that the confession was voluntary. The majority opinion reversed the judgment of the Court of Appeals for the Fourth Circuit and remanded the case to the District Court to enter "such orders as are appropriate and consistent with this opinion, allowing the State a reasonable time in which to retry the petitioner." *Davis* v. *State of North Carolina,* 384 U. S. 737, 16 L. Ed. 2d 895.

On 19 July 1966 Walter B. Nivens and Charles V. Bell filed a petition in Mecklenburg County Superior Court stating in substance: Your petitioners have put in many hours in research, preparation of briefs, and perfection of appeals in the various courts of the United States (which we have set forth above) that they have incurred expenses

in the amount of $1,758.72 in connection with their work in the Federal Courts; that they have sought and obtained the assistance of another attorney in doing research; and that they are of the opinion that the reasonable value of their services rendered in all of these proceedings in the Federal courts, aside from the outlay of expenses, amounted to $30,000. Wherefore, they prayed the State court to enter an order that they be reimbursed for their expenses in the amount of $1,758.72 and be allowed attorney fees of $15,000 each. They filed as an exhibit to their petition an itemized statement of their alleged expenses in representing Elmer Davis, Jr., in the Federal courts.

The State of North Carolina filed an answer to the petition of Nivens and Bell for expenses and counsel fees for their appearances for Elmer Davis, Jr., in the United States courts, in which it alleges in substance: That the State of North Carolina is not liable for and is not authorized by law to pay any counsel fees and expenses to any attorney for services performed in the United States courts; that petitioners Nivens and Bell have been compensated for their legal services in behalf of the defendant in both the Superior and Supreme Courts of North Carolina by the payment to them of $1,700 as fees by Mecklenburg County.

The County of Mecklenburg filed an answer to the request of Nivens and Bell for expenses and counsel fees in the United States courts, in which it alleges in substance: That it has paid to Nivens and Bell by order of court the sum of $1,700 for legal services rendered by them to Elmer Davis, Jr. in his trial in the Superior Court, the Supreme Court of North Carolina, and on a motion for rehearing in the State Supreme Court; that since the enactment of Ch. 1080 of the Session Laws of 1963, the State of North Carolina is responsible for the payment of legal

fees for indigent defendants charged with crime in the States Courts; and that it is not responsible, certainly since the legislation of 1963, for the payment of counsel fees for an indigent defendant in the United States courts.

On 13 October 1966 McLean, J., allowed petitioners Nivens and Bell to amend their petition for counsel fees to allege: "That the failure to allow these petitioners attorney fees for the defendant herein for their services expended in the Federal Courts of the United States is a denial of their rights under the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the Constitution of the United States and a deprivation of their rights under the Constitution of North Carolina."

Judge McLean on 14 October 1966 heard the petition of the said Nivens and Bell for an allowance of attorney fees for their representation of Elmer Davis, Jr., in the United States courts. He entered a judgment wherein, after reciting the history of the case as we have set forth above, he stated in substance: That the State of North Carolina elected not to retry Elmer Davis, Jr., for the rape and murder of Foy Bell Cooper, and he was thereafter ordered released from the State Prison in Raleigh, North Carolina, by the Honorable Algernon Butler, Chief Judge of the United States District Court for the Eastern District of North Carolina; that the Attorney General's office and the Solicitor of the Mecklenburg Solicitorial district represented the State of North Carolina in the United States courts; that it is stipulated by all the parties that the expenses incurred by the petitioners herein in representing the defendant Davis in the courts of the United States amounted to $1,758.72; and that during all the proceedings Elmer Davis, Jr., was an indigent. When Nivens and Bell were appointed to represent Elmer Davis, Jr., Meck-

lenburg County was liable to pay them reasonable attorney fees, and that Mecklenburg County did pay these petitioners the sum of $1,700 for their services, and that since 21 June 1963 the responsibility for paying attorney fees for indigent defendants was placed upon the State of North Carolina pursuant to the provisions of Ch. 1080 of the Session Laws of 1963. This case originated in the North Carolina State Courts and hence the State of North Carolina is liable for payment of attorney fees due these petitioners; that the State of North Carolina paid all costs assessed by the government which covered the costs in the United States District Court, the United States Court of Appeals for the Fourth Circuit, and the United States Supreme Court in the amount of $3,700; that a refusal to pay these petitioners their fees for representing Elmer Davis, Jr., in the Federal courts is a denial of their rights under the Equal Protection and Due Process Clauses of the Fourteenth Amendment to the Constitution of the United States and a deprivation of their rights under the Constitution of North Carolina. Wherefore, Judge McLean ordered and decreed that the State of North Carolina pay to petitioners Nivens and Bell "out of the Indigent Defense Fund established pursuant to Chapter 1080 of the General Session Laws of 1963" the sum of $8,000 for their appearances for the defendant Davis in the United States courts, which amount is to be equally divided between the petitioners herein, and said amount is allowed in addition to the $1,700 heretofore paid them by Mecklenburg County.

On 14 October 1966 McLean, J., entered an order staying the execution of his order for the payment of counsel fees to Nivens and Bell until the State of North Carolina could have his order for the payment of counsel fees reviewed by the Supreme Court, on condition that the State of North

Carolina file application for *certiorari* within 15 days from 14 October 1966.

On 20 October 1966 the Attorney General of the State of North Carolina filed a petition for a writ of *certiorari* for a review by the Supreme Court of Judge McLean's order ordering the payment of $8,000 for counsel fees to the petitioners. We allowed the petition for *certiorari* on 4 November 1966.

Attorney General T. W. Bruton, Deputy Attorney General Ralph Moody, and Assistant Attorney General George A. Goodwyn for the State, appellant.

W. B. Nivens, Charles V. Bell, and Calvin L. Brown for respondents, appellees.

Ruff, Perry, Bond, Cobb & Wade by James O. Cobb and William H. Cannon for Mecklenburg County.

Parker, C. J. Article IV, Judicial Department, of the Constitution of North Carolina, was entirely rewritten by an amendment adopted by a majority vote of the people of North Carolina in the general election held on 2 November 1962.

Article IV, sec. 10(1), now provides in part: The Supreme "Court shall have the power to issue any remedial writs necessary to give it a general supervision and control over the proceedings of the other courts." The North Carolina Constitution, Article IV, sec. 8, as it was written before the general election of 2 November 1962 vested the Supreme Court with authority to issue any remedial writs to give it a general supervision and control over the proceedings of the inferior courts. *S.* v. *Cochran*, 230 N. C. 523, 53 S. E.

2d 663. The legal question here presented is of such public importance that we decided to exercise our constitutional supervisory authority to issue a *certiorari* to review the validity of Judge McLean's judgment ordering the State of North Carolina to pay Nivens and Bell the sum of $8,000 as legal fees for their appearances for defendant, Elmer Davis, Jr., in the United States courts "out of the Indigent Defense Fund established pursuant to Chapter 1080 of the General Session Laws of 1963."

On 10 November 1959 Francis O. Clarkson, Judge presiding over the court in Mecklenburg County, entered an order finding that Elmer Davis, Jr., is an indigent person charged in an indictment with the capital felony of murder in the first degree, and appointed Walter B. Nivens and Charles V. Bell to represent him "in the Superior Court of Mecklenburg County, North Carolina." Nivens and Bell appeared for the defendant Davis in the Superior Court of Mecklenburg County and in the Supreme Court of North Carolina, as set forth above. Pursuant to the mandatory provisions of G. S. 15-5 as it was in force prior to the 1963 Session of the General Assembly, the court entered an order that Mecklenburg County pay to the said Nivens and Bell a fee of $1,700 for their services in defending the said Davis in the Superior Court of Mecklenburg County and in the Supreme Court of North Carolina, which fee has been paid by Mecklenburg County.

Thereafter, the said Nivens and Bell filed a petition in behalf of the said Elmer Davis, Jr., who was in the custody of the State of North Carolina under sentence of death, for a writ of habeas corpus in the United States District Court for the Eastern District of North Carolina, Raleigh Division. Butler, Chief Judge for the United States District Court for the Eastern District filed a written opinion on 25

July 1961 denying the writ. *Davis* v. *State of North Carolina,* 196 F. Supp. 488. Thereafter, the said Nivens and Bell made appearances in behalf of the said Davis in various courts of the United States, and as a final result of their appearances the Supreme Court of the United States, in an opinion filed 30 June 1966, held that the confession of Elmer Davis, Jr., was involuntary and inadmissible in evidence, and reversed the judgment of the Court of Appeals for the Fourth Circuit and remanded the case to the District Court to enter "such orders as are appropriate and consistent with this opinion, allowing the State a reasonable time in which to retry the petitioner." *Davis* v. *State of North Carolina,* 384 U. S. 737, 16 L. Ed. 2d 895. Nivens and Bell and the Attorney General of North Carolina entered into the following written stipulations signed by them:

> "1. That at the time of the appointment of Nivens and Bell, Attorneys, to represent Elmer Davis, Jr., by Judge Clarkson on the 10th of November, 1959, and down to the present date, Elmer Davis, Jr., was and is an indigent person.
>
> "2. That at no time did either Mr. Nivens or Mr. Bell receive an order from any Federal Judge or Federal Court appointing them or either of them as counsel for Elmer Davis, Jr., in any proceedings in the Federal Court."

On 18 March 1963 the Supreme Court of the United States handed down its decision in *Gideon* v. *Wainwright,* 372 U. S. 335, 9 L. Ed. 2d 799, overruling *Betts* v. *Brady,* 316 U. S. 455, 36 L. Ed. 1595, and held in the majority opinion that the Sixth Amendment's provision that in all criminal prosecutions the accused shall enjoy the right to have the

assistance of counsel for his defense was made obligatory upon the states by the Fourteenth Amendment.

The 1963 General Assembly of North Carolina, which was in session on March 18, passed Ch. 1080 of the Session Laws of 1963 as a result of the decision in the Gideon case. Ch. 1080 of the Session Laws of 1963, codified as G. S. 15-4.1, 15-5 *et seq.*, provides, in part, for the appointment of counsel by Superior Court Judges for every defendant in all felony cases when the court finds that the defendant is indigent and unable to employ counsel, but the act provides that the defendant may waive counsel if he so desires in a felony case, except in a capital case. G. S. 15-5 as it now is in force provides that the fees of counsel appointed by Superior Court Judges to defend indigent defendants shall be paid by the State of North Carolina.

Ch. 1080, section 4, of the Session Laws of North Carolina 1963, reads as follows:

> "There is hereby appropriated from the general fund of the state of North Carolina, or from any other available funds of the State, the sum of five hundred thousand dollars ($500,000.00) for the fiscal year ending June 30, 1964, and five hundred thousand dollars ($500,000.00) for the fiscal year ending June 30, 1965, for the purpose of paying the fees, costs and expenses provided for by this Act. All costs, fees, and expenses shall be paid by voucher issued by the State Treasurer according to the procedures for payment of debts due by the State and supported by order of the court."

For the fiscal year ending 30 June 1964 there was paid out of the State Treasury by orders of Superior Court Judges the sum of $238,956 in payment of fees to lawyers who were appointed by Superior Court Judges to repre-

sent 3,003 indigent defendants, and for the fiscal year ending 30 June 1965 there was paid out of the State Treasury by orders of Superior Court Judges the sum of $390,427 in payment of fees to lawyers who were appointed by Superior Court Judges to represent 3,941 indigent defendants. Ch. 914, section 2, of the Session Laws of North Carolina 1965 appropriated from the general fund of the State for counsel for indigent defendants $442,332 for the fiscal year ending 30 June 1966, and $475,382 for the fiscal year ending 30 June 1967. For the fiscal year ending 30 June 1966 there was paid out of the State Treasury by orders of Superior Court Judges the sum of $491,600 in payment of fees to lawyers who were appointed by Superior Court Judges to represent 4,450 indigent defendants: this was more money than appropriated by the General Assembly, so $50,000 was added to the appropriation from the State's contingency and emergency fund. For the fiscal year ending 30 June 1967 up through 31 March 1967 there was paid out of the State Treasury by orders of Superior Court Judges the sum of $379,950 in payment of fees to lawyers who were appointed by Superior Court Judges to represent 3,301 indigent defendants. All of these payments of fees by order of Superior Court Judges to lawyers who were appointed by Superior Court Judges to represent indigent defendants were made for representation in the courts of the State of North Carolina, and none for lawyers to represent indigent defendants in the courts of the United States. The above information was furnished from the records of the Administrative Assistant to the Chief Justice.

A careful study of Ch. 1080, Session Laws of 1963, shows that the language of the statute is clear and unambiguous, and that the statute provides for the payment of fees to

lawyers who are appointed by Superior Court Judges of the State to represent such defendants only in the courts of the State of North Carolina. There cannot be read into the clear and unambiguous words of this statute language authorizing a Superior Court Judge of the State to order the State Treasury to pay public funds raised by taxation of its people for fees for lawyers appearing for indigent defendants in the courts of the United States. There is no statute of North Carolina that provides for the payment of fees to lawyers representing indigent defendants in criminal cases in the United States courts.

G. S. 1504 provides: "Every person, accused of any crime whatsoever, shall be entitled to counsel in all matters which may be necessary for his defense." In *Pardee* v. *Salt Lake County*, 39 Utah 482, 118 P. 122, the Court held that the Utah Constitution, Article 1, section 7, providing that no person shall be deprived of his property without due process of law, would not apply to make a county liable for the services of any attorney appointed by the court to defend an indigent accused. In a scholarly opinion, with voluminous citation of authority, the Court states in substance that the power to provide compensation for lawyers representing indigent defendants rests with the Legislature and not the courts. In *Ruckenbrod* v. *Mullins*, 102 Utah 548, 133 P. 2d 325, 144 A.L.R. 839, it is said:

> "The majority of jurisdictions hold that an attorney is an officer of the court with many rights and privileges, and must accept his office cum onere. One of the burdens incident to the office, recognized by custom of the courts for many years, is the duty of the attorney to render his services gratuitously to indigent defendants at the suggestion of the court."

Many cases and authorities are cited in support of the statement.

No Judge of the State of North Carolina entered an order authorizing Nivens and Bell to appear in behalf of the defendant, Elmer Davis, Jr., in the courts of the United States. Nivens and Bell and the Attorney General of North Carolina stipulated as follows: "That at no time did either Mr. Nivens or Mr. Bell receive an order from any Federal Judge or Federal Court appointing them or either of them as counsel for Elmer Davis, Jr., in any proceedings in the Federal Court."

This is stated in an annotation in 130 A.L.R. 1440:

> "The weight of authority supports the view that in the absence of statute providing therefor, an attorney who has been assigned by the court to defend an indigent accused cannot recover compensation therefor from the public."

Many cases are cited in support of the statement. To the same effect, 7 C.J.S., Attorney and Client, S 172 a (1).

This is said in 7 Am. Jur. 2d, Attorneys at Law, S. 207:

> "It has often been held that an attorney appointed by the court to defend cannot recover compensation from the public for his services in the absence of an enabling statute. The reason is that an attorney, being an officer of the court, like other officers takes his office cum onere, and one of the burdens of office which custom has recognized is the gratuitous service rendered to a poor person at the suggestion of the court. The constitutional guaranty of the right of an accused to be heard by counsel does not impose any liability on the pay an attorney assigned to represent the indigent.

And the courts have stated that requiring an attorney to defend an accused who cannot pay does not involve an unconstitutional taking of property without compensation or without due process of law.

• • •

"The circumstances under which an attorney may receive compensation for representing an indigent on an appeal from a conviction appears to be regulated by statute."

The United States Congress in 1964—which was subsequent to the enactment of Ch. 1080, Session Laws of 1963 of North Carolina—passed an act providing for the appointment and payment of counsel for indigent defendants. 18 U.S.C.A. S3006A.

In *Dolan* v. *United States*, 351 F. 2d 671, the United States Court of Appeals for the Fifth Circuit, in an opinion filed 8 October 1965, held that an attorney was not entitled to compensation for professional services rendered in representation of an indigent defendant by court appointment prior to enactment into law of the Criminal Justice Act of 1964. 18 U.S.C.A. S3006A.

In *United States* v. *Dillon*, 346 F. 2d 633, decided 16 June 1965 rehearing denied 27 July 1965, the United States Court of Appeals for the Ninth Circuit stated:

". . . the vast majority of the courts which have passed on the question have denied claims of appointed counsel for nonstatutory just compensation, pointing out that representation of indigents under court order, without a fee, is a condition under which lawyers are licensed to practice as officers of the court, and that the obligation of the legal profession to serve without

compensation has been modified only by statute. An applicant for admission to practice law may justly be deemed to be aware of the traditions of the profession which he is joining, and to know that one of these traditions is that a lawyer is an officer of the court obligated to represent indigents for little or no compensation upon court order. Thus, the lawyer has consented to, and assumed, this obligation and when he is called upon to fulfill it, he cannot contend that it is a 'taking of his services.' Cf. Kunhardt & Company, Inc. v. United States, 266 U.S. 537, 45 S. Ct. 158, 69 L. Ed. 428 (1925)."

See a most interesting appendix to this opinion, stating in substance that representation of indigents upon court order is an ancient tradition of the legal profession, going as far back as fifteenth-century England and pre-Revolutionary America, and the appointment of counsel to represent an indigent is not a "taking." This appendix states:

"Clearly, the lawyer's traditional obligation to represent indigents upon court order has not included any common-law right to compensation. And the statutory compensation which exists in some states usually contains limitations which in most cases would prevent a lawyer from receiving what his time is worth when working for private clients—limitations which would clearly be invalid if constitutional standards of just compensation were applicable . . . These statutory fees, which frequently cover capital cases only, range from the Kansas maximum of $10 a day . . . to the $1,500 minimum per case in New York (for capital cases only) . . .

"A Fifth Amendment 'taking' does not occur when the state simply requires an individual to fulfill a commitment he has made. (Citing authority.)"

Griffin v. *Illinois*, 351 U.S. 12, 100 L. Ed. 891, relied upon by Nivens and Bell is not in point. In that case a majority of the Court held the due process and equal protection clauses of the Fourteenth Amendment were violated by the State's denial of appellate review solely on account of a defendant's inability to pay for a transcript. The last paragraph of G. S. 15-4.1 reads: "When an appeal is taken under this section the county shall make available trial transcript and records required for an adequate and effective appellate review."

The State of North Carolina assigns as error this legal conclusion of Judge McLean: "That a refusal to pay these petitioners is a denial of their rights under the Equal Protection and Due Process Clauses of the Fourteenth Amendment to the Constitution of the United States and a deprivation of their rights under the Constitution of North Carolina." This assignment of error is sustained for the following reasons: One. Under the facts of this case and the law stated above, petitioners Nivens and Bell have no right under the equal protection and due process clauses of the Fourteenth Amendment to compensation to be paid them by the State for their appearances in behalf of the defendant Davis in the United States courts. Two. Judge McLean in his judgment states in part "that a refusal to pay these petitioners is . . . a deprivation of their rights under the Constitution of North Carolina," but Judge McLean does not state any specific provision of the State Constitution that is violated. Nivens and Bell and Brown in their brief do not cite any specific provision of the Constitution of

North Carolina that is violated. Constitutional questions are of great importance, and should not be presented in uncertain form to a court for decision. It is generally held that a person who asserts that a particular act violates his rights under the Constitution must point out the particular provision of the Constitution that he claims is violated. Ordinarily, a court will not inquire into the alleged violation of a constitutional right without a precise statement of the constitutional right violated, for that would lead to the court formulating a rule broader than that necessitated by the precise situation in question. *Rice* v. *Rigsby*, 259 N. C. 506, 131 S. E. 2d 469. Suffice it to say that petitioners Nivens and Bell have not shown any rights of theirs under the State Constitution will be violated by the State of North Carolina not paying them fees for representing the defendant Davis in the United States courts under the particular facts of this case.

The State of North Carolina assigns as error Judge McLean's judgment ordering and decreeing "that the State of North Carolina pay to these petitioners out of the Indigent Defense Fund established pursuant to Chapter 1080 of the General Session Laws of 1963 aforesaid, the sum of Eight Thousand ($8,000.00) Dollars, which amount is to be equally divided between the petitioners herein, and said amount is allowed in addition to the amount heretofore paid by Mecklenburg County to these petitioners." This assignment of error is good.

Moneys paid into the hands of the State Treasurer by virtue of a State law become public funds for which the Treasurer is responsible, and may be disbursed only in accordance with legislative authority. State Constitution, Article XIV, section 3; *Gardner* v. *Retirement System*, 226

N. C. 465, 38 S. E. 2d 314. To the same effect, 81 C.J.S., States, S 156.

So far as an exhaustive search upon our part discloses, and so far as briefs of counsel show, this is a case of first impression in this jurisdiction, and of first impression in the appellate courts of this Nation.

The judgment of Judge McLean ordering and decreeing "that the State of North Carolina pay to these petitioners out of the Indigent Defense Fund established pursuant to Chapter 1080 of the General Session Laws of 1963 aforesaid, the sum of Eight Thousand ($8,000.00) Dollars, which amount is to be equally divided between the petitioners herein, and said amount is allowed in addition to the amount heretofore paid by Mecklenburg County to these petitioners," for their appearances for defendant Davis, an indigent, in the courts of the United States, under the facts set forth above is not authorized by any statute of the State of North Carolina and is repugnant to the specific provisions of Article XIV, section 3, of the North Carolina Constitution, which states in language no man can misunderstand that the legislative power is supreme over the public purse. Judge McLean's judgment is void, and is Reversed.

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Supreme Court of the United States

October Term, 1967

No. 340

STATE OF NORTH CAROLINA,

Respondent,

v.

ELMER DAVIS, JR.,

(Petition of Nivens and Bell, Attorneys)

BRIEF OF RESPONDENT STATE OF NORTH CAROLINA IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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OPINION BELOW

The Opinion of the Supreme Court of North Carolina in this case now before this Court is reported in 270 N. C. 1 (Advance Sheets of Cases Argued and Determined in the Supreme Court of North Carolina, filed 12 April and 19 April, and issued 28 April, 1967). The Case is reported in the Southeastern Reporter System (153 S.E. 2d 749).

JURISDICTION

The Petitioners attempt to invoke the jurisdiction of this Court under Title 28 USC 1257(3). The Respondent, State of North Carolina, contends that there is no basis for the exercise of the jurisdiction of this Court as will be argued later on in this brief.

QUESTION PRESENTED

DOES THE REFUSAL OF THE STATE OF NORTH CAROLINA TO PAY PETITIONERS ATTORNEY FEES

FOR LEGAL SERVICES PERFORMED IN THE FEDERAL COURTS ON BEHALF OF AN INDIGENT DEFENDANT IN A CAPITAL CASE WHERE SUCH LEGAL SERVICES ARE NOT AUTHORIZED BY ANY COURT ORDER, EITHER STATE OR FEDERAL, AMOUNT TO A DENIAL OF THE PETITIONERS' CONSTITUTIONAL RIGHTS UNDER THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES?

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

On pp. 3 and 4 of Petitioners' Petition for a Writ of Certiorari filed in this Court the Petitioners quote the pertinent parts of the Fourteenth Amendment, the Sixth Amendment and the North Carolina statutes in force when this case was tried in the trial court and decided by the Supreme Court of North Carolina.

Effective as of June 21, 1963, the General Assembly of North Carolina amended its statutes as to the appointment of counsel for indigent defendants, the pertinent sections being as follows:

> "Sec. 15-4.1. *Appointment of counsel for indigent defendants; plea of guilty by defendant without counsel; trial transcript and records for appeal by indigent defendant.*—When a defendant charged with a felony is not represented by counsel, before he is required to plead the judge of the superior court shall advise the defendant that he is entitled to counsel. If the judge finds that the defendant is indigent and unable to employ counsel, he shall appoint counsel for the defendant but the defendant may waive the right to counsel in all cases except a capital felony by a written waiver executed by the defendant, signed by the presiding judge and filed in the record in the case. The judge may in his discretion appoint counsel for an indigent defendant charged with a misdemeanor if in the opinion of the judge such appointment is warranted unless the de-

fendant executes a written waiver of counsel as above specified. A defendant with or without counsel may plead guilty but if the defendant is without counsel, the judge shall inform the accused of the nature of the charge and the possible consequences of his plea, and as a condition of accepting the plea of guilty the judge shall examine the defendant and shall ascertain that the plea was freely, understandably and voluntarily made, without undue influence, compulsion or duress, and without promise of leniency, but a defendant without counsel cannot plead guilty to an indictment charging a capital felony. Unless the judge determines that the plea of guilty was so made, it shall not be accepted. In case of an appeal to the Supreme Court the judge shall appoint counsel for such appeal or continue the services of counsel already appointed for the trial. The judge shall appoint counsel as soon as possible and practicable to the end that counsel so appointed may have adequate notice and sufficient time to prepare for a defense.

"When an appeal is taken under this section the county shall make available trial transcript and records required for an adequate and effective appellate review.

"Sec. 15-5. *Fees allowed counsel assigned to indigent defendant.*—Whenever an attorney is appointed by the court to defend an indigent defendant, he shall receive a fee for performing such service to be fixed by the court which shall be reasonable and commensurate with the time consumed, the nature of the case, the amount of fees usually charged for such cases in the county or locality. The fee so allowed shall be entered as a judgment against the defendant, signed by the court, and docketed in the judgment docket in the office of the clerk of the superior court and shall constitute a lien as provided by the general law of the State pertaining to judgments. Any funds collected by reason of said judgment shall be deposited in the State Treasury. All costs necessary for the administration of this section shall

be paid by the State of North Carolina except regular and ordinary court costs which shall be paid by the county as now provided by law."

HISTORY OF THE CASE

The Defendant, Elmer Davis, Jr., was convicted in the Superior Court of Mecklenburg County, North Carolina, of the murder of Foy Bell Cooper, which murder was committed while the Defendant was engaged in the rape of Foy Bell Cooper. The deceased was an elderly lady who had been in the habit of visiting her mother's grave in Elmwood Cemetery. Her body was found in a mausoleum located in the same cemetery. The Defendant having been convicted and sentenced to death appealed to the Supreme Court of North Carolina which affirmed the judgment of the trial court (STATE v. ELMER DAVIS, JR., 253 N. C. 86, 116 S. E. 2nd 365).

The Defendant filed a Petition for Certiorari in this Court, and the Petition was denied (ELMER DAVIS, JR., Petitioner, v. NORTH CAROLINA, 365 U. S. 855, 5 L. ed. 2d 819, 81 S. Ct. 816). The Petitioner filed a Petition for a Writ of Habeas Corpus in the Federal District Court, and this was denied (196 F. Supp. 488). The decision of the District Court was reversed by the Circuit Court of Appeals for the Fourth Circuit (310 F. 2d 904). A full hearing was held in the Federal District Court, and Habeas Corpus was again denied (221 F. 2d 494). On December 8, 1964, the decision of the Federal District Court was affirmed by the Court of Appeals (339 F. 2d 770). The Petitioner then filed a Petition for Certiorari in this Court and Certiorari was granted (ELMER DAVIS, JR., Petitioner, v. NORTH CAROLINA, 382 U.S. 953, 15 L. ed. 2d 358, 86 S. Ct. 439). This Court heard argument in the case on or about April 7, 1966, and reversed the lower court, holding that the confession of the Petitioner, Davis, was constitutionally inadmissible in evidence (ELMER DAVIS, JR., Petitioner, v. STATE OF NORTH CAROLINA, 384 U. S. 737, 16 L. ed. 2d 895, 86 S. Ct. 1761).

After the decision of this Court the State of North Carolina

concluded that it could not go any further in the prosecution of the Defendant, Elmer Davis, Jr., and the District Court ordered Davis released from the State Prison.

STATEMENT OF FACTS

In view of the fact that the Petitioners in this application for certiorari have not designated and certified the complete record the Respondent State of North Carolina has requested the Clerk of the Supreme Court of North Carolina, pursuant to Section 4 of Rule 21 of the Supreme Court Rules, to certify nine copies of the record which was printed for the use of the Supreme Court of North Carolina, as well as the Opinion of the Supreme Court of North Carolina and other papers in the record of the case. In this brief we will refer to the State record as "S. R.".

As we have stated before, in the History of the Case, the Defendant, Elmer Davis, Jr., was convicted in the Superior Court of Mecklenburg County, North Carolina, for the murder of Foy Bell Cooper, an elderly woman, while engaged in the perpetration of a rape. This conviction was affirmed by the Supreme Court of North Carolina and is reported as STATE v. ELMER DAVIS, JR., 253 N. C. 86, 116 S. E. 2d 365. The facts in the case appear in the Statement and Opinion of the Supreme Court of North Carolina. This Court denied Petition for Certiorari and the Petitioner, Elmer Davis, Jr., applied for Habeas Corpus in the District Court of the United States. There were various hearings and appeals and a resume of these proceedings in the Federal Court is set forth in the Petition which the Petitioners Nivens and Bell filed in the trial court and appears on pp 14, 15, of S. R. A resume with citations of the Opinions of the various Federal Courts is also set forth in this brief under the subject of "The History of the Case." This Court granted Petition for Certiorari, thus bringing up the case from the Circuit Court of Appeals for the Fourth Circuit, and this Court reversed the lower courts (ELMER DAVIS, Jr., Petitioner, v. STATE OF NORTH CAROLINA, 384 U. S. 737, 16 L. ed. 2d 895, 86 S. Ct. 1761.)

The State of North Carolina being of the opinion that it could not proceed any further in the case in view of the decision of this Court, the Defendant, Elmer Davis, Jr., was ordered by the District Court to be released from the State Prison insofar as this charge was concerned.

The only order authorizing the Petitioners, Nivens and Bell, to appear for the Defendant, Elmer Davis, Jr., will be found on S. R. p. 13, which appointed the Petitioners, Nivens and Bell, to represent the Defendant, Elmer Davis, Jr., "in the Superior Court of Mecklenburg County, North Carolina." Under the North Carolina law as it existed at that time for the appointment of counsel for an indigent defendant in a capital case the county was liable for the attorneys' fees under such an appointment (see p. 4 of the Petition for a Writ of Certiorari filed by the Petitioners in this case—North Carolina General Statutes, Section 15-5).

Mecklenburg County paid to the Petitioners, Nivens and Bell, the sum of $1700.00, which was determined by the Judges of the Superior Court of Mecklenburg County to be proper compensation for the legal services of Petitioners Nivens and Bell in the State Courts, and this is not denied by the Petitioners in this case. On S. R. p. 30 the Court will see that the trial judge found that Mecklenburg County had paid the Petitioners Nivens and Bell the sum of $1700.00.

The trial judge made findings of fact and entered judgment that the Petitioners Nivens and Bell be paid the sum of $8,000.00, to be divided between the two Petitioners, and that this was to be paid out of the Indigent Defense Fund established pursuant to Chapter 1080 of the Session Laws of 1963, of the State of North Carolina, which appropriation was made to pay counsel fees for attorneys for their services in the State courts and not the Federal courts as appears from the Opinion of the Supreme Court of North Carolina, which appears as a part of the Appendix to the Petition filed in this Court by the Petitioners, beginning on p. 6a.

The State of North Carolina filed a Petition in the Su-

preme Court of North Carolina to have the judgment of the trial court, as well as the record, brought up for review by that Court, and this Petition was granted and the matter reviewed by the Supreme Court of North Carolina upon briefs and argument, and this resulted in a decision of the Supreme Court of North Carolina to the effect that the judgment of the lower court be reversed and that the Petitioners Nivens and Bell were not entitled to compensation from the funds of North Carolina for thir services performed in the Federal Courts on behalf of Elmer Davis, Jr. (see 270 N. C. 1, 153 S. E. 2d 749, No. 7 Advance Sheet of South Eastern Reporter, 2nd series, May 4, 1967).

ARGUMENT

There are certain things that should be set forth in this case which are either admitted or not denied, as follows:

(1) The Petitioners Nivens and Bell were appointed by a court order to defend Elmer Davis, Jr. in a capital case in the Superior Court of Mecklenburg County. The order of the trial judge will be found on p. 13 of S. R., and the effective part of the order reads as follows:

> "Now, therefore, the court appoints Charles V. Bell and Walter Nivens of the Twenty-Sixth Judicial Bar to represent the above named defendant, Elmer Davis, in the Superior Court of Mecklenburg County, North Carolina."

This order was entered on November 10, 1959, and constitutes the sole and only order of appointment of counsel in all of the proceedings.

(2) It is stipulated by the Petitioners Nivens and Bell (see S. R. p. 44) that they never at any time had or received any order of appointment to represent Elmer Davis, Jr. in any of the proceedings in the Federal Court. The paragraph covering this stipulation is as follows:

> "That at no time did either Mr. Nivens or Mr. Bell receive an order from any federal judge or federal court

appointing them or either of them as counsel for Elmer Davis, Jr. in any proceeding in the federal court."

(3) That under the laws of North Carolina at the time this case was tried in the trial court and up through the period of time that the case was decided by the Supreme Court of North Carolina an indigent was entitled to counsel in a capital case to be appointed by the court, and counsel for such indigent defendant "shall receive such fee for performing this service as the judge may allow; * * * The fees so allowed by the judge shall be paid by the county in which the indictment was found."

(4) As found by the trial judge in Paragraph 12 of his Findings of Fact, Mecklenburg County paid the Petitioners Nivens and Bell $1700.00 for their services in the State court, and this was received and accepted by the Petitioners Nivens and Bell without any exception or objection (see S. R. p. 30).

(5) The State of North Carolina never at any time, either by judicial, administrative or executive authority, authorized the Petitioners Nivens and Bell to appear for the Defendant Elmer Davis, Jr. in any of the Federal courts, and so far as this record shows the Petitioners Nivens and Bell appeared for the defendant Elmer Davis, Jr. in the Federal courts because of their own wishes, of their own motion and as volunteers.

(6) The Petitioners Nivens and Bell do not allege or say, one way or the other, whether they received any compensation or fees from organizations, such as NAACP, CORE, ACLU or associations or organizations of like kind.

As will be seen from the quotation of statutes in this brief, North Carolina passed an act in 1963 (effective June 21, 1963) which provided for the appointment of counsel for any indigent defendant charged with a felony and also providing that the judge in his discretion could appoint counsel for an indigent defendant charged with a misdemeanor if in

the opinion of the judge such appointment of counsel was considered necessary. The statute also provided for a written waiver of counsel and for pleas of guilty after the accused had been informd by the judge of the nature of the charge and the possible consequences of the plea of guilty. The trial judge is required to examine the defendant to see that the plea is freely, understandably and voluntarily made without undue influence, compulsion or duress, and without promise of leniency. A defendant without counsel cannot plead guilty to a capital felony. This statute was never at any time applicable to the services performed by the Petitioners Nivens and Bell and has never been construed to be retroactive in its application. The North Carolina statute was passed in response to the decision of this Court in GIDEON v. WAINWRIGHT, 372 U. S. 335, 9 L. ed. 2d 799, 83 S. Ct. 792, 93 ALR 2nd 733. As pointed out by the Supreme Court of North Carolina, the State statute provides for the appointment of counsel by Superior Court judges for indigent defendants and provides for the payment of fees to attorneys who are appointed by Superior Court judges of the State to represent such defendants only in the courts of the State. This is a construction of the Supreme Court of North Carolina, as will be shown by Mr. Chief Justice Parker, and this appears on pp. 15a, 16a, of the Appendix to the Petitioners' Petition for a Writ of Certorari filed in this Court. Furthermore, the State of North Carolina appropriated $1,000,000.00 for the biennium of 1963-1965, for the purpose of paying the fees, costs and expenses of the State Act (see p. 16a of Petitioners' Appendix). As shown by the Opinion of the Supreme Court of North Carolina, the State of North Carolina for the fiscal year ending June 30, 1964, paid, pursuant to orders of State court judges, the sum of $238,-956.00 to attorneys defending indigent defendants, there being a total of 3,003 such defendants, and for the fiscal year ending June 30, 1965, the State paid $390,427.00 to attorneys representing 3,941 indigent defendants. There was appropriated by the State to pay counsel for indigent defendants the sum of $442,332.00 for the fiscal year ending June 30, 1966, and $475,382.00 for the fiscal year ending June 30, 1967. For the fiscal year ending June 30, 1966, the State

paid out the sum of $491,600.00 to attorneys who represented 4,450 indigent defendants. The amounts paid exceeded the appropriation and $50,000.00 was made available by the State from the State's Contingency and Emergency Fund. For the fiscal year ending June 30, 1967, up through March 31, 1967, there was paid by the State to attorneys defending indigent defendants $379,950.00 for representation of 3,301 indigent defendants.

It is clearly the weight of authority, as shown by the Opinion of the Supreme Court of North Carolina, that in the absence of an enabling statute an attorney assigned by the court to defend an indigent defendant cannot recover compensation therefor from public funds. The Congress of the United States evidently thought that this was so because it enacted the Criminal Justice Act of 1964 (18USCA 3006A—Public Law 88—455; 78 Stat. 552). We understand that this Act has been construed not to be retroactive.

The Case of GRIFFIN v. ILLINOIS, 351 U. S. 12, 100 L. ed. 891, 76 S. Ct. 585, is certainly not in point in any respect. The case simply held that it was a constitutional requirement for the State to furnish a free transcript so that an indigent defendant could obtain an appellate review. Actually the appellate review sought by Griffin was in a State court. It is not denied that likewise transcripts of the record should be furnished indigent defendants by the State for post-conviction proceedings. This is because the State is the custodian of these records and they should be available to the indigent as well as to those who can afford to pay for same.

Moneys paid into the State Treasury may be disbursed only in accordance with State legislative authority. It is provided by the North Carolina Constitution (Article XIV, Section 3) as follows:

> "No money shall be drawn from the Treasury but in consequence of appropriations made by law; and an accurate account of the receipts and expenditures of the public money shall be annually published."

If the position of the Petitioners Nivens and Bell is legally correct, then any attorney without appointment or authorization by the State of North Carolina may institute proceedings in the Federal court, and the State will be obliged to pay for same although the State did not sanction such appearance and would have no control over the attorney as to his conduct and efforts in protecting the rights of an indigent defendant and would have to pay the fee of the attorney, although there is no statutory authority to pay such fee and there is no authority for any State officer to determine the value of the services.

The State of North Carolina has no control and no authority over attorneys who represent indigent defendants in the Federal courts, yet under the theory of the Petitioners it would be liable for these obligations which are purely Federal in nature. There is no constitutional right for an attorney, who is an officer of the court, to receive fees for his services to an indigent defendant.

There is a general statement by Petitioners that their constitutional rights have been violated by withholding compensation in this case but it is not pointed out by them by any concrete statement the rights violated.

There is no possible way by which the Petitioners Nivens and Bell can assert their claim because the State of North Carolina appeared in the Federal courts through its own counsel, it being a party to the proceedings, and the fact that North Carolina paid the costs assessed against it does not give rise or support to the claims of the Petitioners.

CONCLUSION

If there is still any separation of powers between the State and Federal Government, then the Petitioners' claims cannot be sustained. The fact that the State prosecuted the Defendant, Elmer Davis, Jr., does not support the claims of the Petitioners, Nivens and Bell. The State did not institute any proceedings in the Federal Court and cannot by any

stretch of the imagination incur obligations to the Petitioners because it defended itself in the Federal courts. For these reasons the Petition for Certiorari filed in this matter should be denied.

Respectfully submitted,

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